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No. 651

In the Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING ET AL., PETITIONERS

v.

JAMES WALTER CARTER ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. —

GUY T. HELVERING, INDIVIDUALLY AND AS COMMISmissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett; individually and as United States Attorney in and for the District of Columbia, petitioners

v.

JAMES WALTER CARTER, CARTER COAL COMPANY, George L. Carter as Vice President and a Director of said Company; C. A. Hall as Secretary-Treasurer and a Director of said Company; John Callahan, Joseph W. Gorman, and Walter S. Denham as Vice Presidents of said Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Guy T. Helvering and others, individually and as officers of the United States, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review that part of the decree, entered on December 10, 1935, by the Supreme Court of the District of Columbia in the case of *James Walter Carter* v. *Carter Coal Company et al.*, which is numbered "(2)" and which permanently enjoins petitioners herein from assessing or collecting from the Carter Coal Company any taxes in excess of one and one-half percent of the sale price at the mines on sales or other disposals of bituminous coal between November 1, 1935 (the date the taxes commenced to accrue) and December 10, 1935 (the date of entry of the decree). The case has not yet been submitted to, heard, or decided by the United States Court of Appeals for the District of Columbia.

OPINION BELOW

The opinion of the Supreme Court of the District of Columbia has not yet been reported.

JURISDICTION

The final decree of the Supreme Court of the District of Columbia was entered December 10, 1935. Appeal was taken by petitioners herein and allowed by the court on December 16, 1935, and the case was

docketed in the United States Court of Appeals for the District of Columbia on the same day. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below—after sustaining certain regulatory provisions, and the taxing provisions, of the Act as valid and constitutional—properly granted the respondent James Walter Carter a permanent injunction against the assessment or collection from the Carter Coal Company of taxes imposed by Section 3 of the Bituminous Coal Conservation Act of 1935, accruing between November 1, 1935 (the date the taxes imposed by Section 3 commenced to accrue), and December 10, 1935 (the date of entry of the decree), in excess of one and one-half percent of the sale price at the mines on sales or other disposals of bituminous coal.

STATUTE INVOLVED

The Bituminous Coal Conservation Act of 1935 is set forth in full in the Appendix to the petition for certiorari filed by James Walter Carter in No. 636.

STATEMENT

The tax provisions of the Bituminous Coal Conservation Act of 1935 are found in Section 3, which imposes an excise tax upon the "sale or other disposal of all bituminous coal produced within the

United States." The tax is imposed at the rate of fifteen percent on the sale price at the mine (except captive coal as to which the tax is on the fair market value at the mine), "payable monthly for each calendar month, on or before the first business day of the second succeeding month." It is further provided, however, that any coal producer "who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in Section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax" equivalent to ninety percent of the amount of the tax. The drawback is to be allowed and deducted at the time settlement for the tax is required, and it applies "to all coal sold or disposed of from and after the date of the producer's filing with the Commission his acceptance of said code."[1]

It is expressly provided, by Section 3 of the Act, that—

> No producer shall, by reason of his acceptance of the code * * * or of the drawback of taxes * * * be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.

[1] It should be noted that the drawback of ninety percent of the amount of the fifteen percent excise tax imposed on the sale price of coal at the mine is the equivalent of a drawback of thirteen and one-half percent of the sale price, which leaves a net excise tax of one and one-half percent to be paid by all producers (including those who file acceptances of the code) on the sale price of coal at the mine.

The form of acceptance, promulgated by the National Bituminous Coal Commission pursuant to the Act, similarly provides:

> The undersigned, bituminous coal producer, hereby accepts the Bituminous Coal Code, formulated and prescribed October 9, 1935, by the National Bituminous Coal Commission, in General Order No. 1 of said Commission, pursuant to and under the provisions of an Act of Congress, entitled "Bituminous Coal Conservation Act of 1935."
>
> Neither this acceptance, nor compliance with the provisions of said Code, nor acceptance of the drawback provided by said Act, shall be held to preclude or estop the undersigned from contesting the constitutionality of any provision of said Code or of said Act, or the validity thereof as applicable to the undersigned, in any proceeding authorized by said Act or any other appropriate proceeding at law or in equity.

The respondent James Walter Carter, a stockholder and officer of the Carter Coal Company, brought suit in the Supreme Court of the District of Columbia against the Carter Coal Company and its officers and directors to restrain them from filing an acceptance of the Bituminous Coal Code created pursuant to the Bituminous Coal Conservation Act of 1935, and from paying any tax imposed by the Act. Respondent Carter also joined as defendants the petitioners herein, who are officers of the Government, seeking to restrain them from as-

sessing or collecting any tax imposed by the Act, or from otherwise enforcing the taxing provisions.

At the commencement of the trial of the case on October 29, 1935, respondent Carter applied for an injunction *pendente lite* against the petitioners herein. The court denied the application, but granted an injunction against the Carter Coal Company and its officers and directors restraining them *pendente lite* from executing or filing an acceptance of the code, conditioned upon the giving by respondent Carter of a satisfactory bond to protect the Company from any loss that might result to it from the injunction. Respondent Carter appealed from this order to the United States Court of Appeals for the District of Columbia and immediately petitioned this Court for a writ of certiorari and also for a temporary injunction. (No. 563, October Term, 1935.) On November 11, 1935, this Court denied the petitions for writ of certiorari and for a temporary injunction.

The trial was concluded on November 27, 1935, and the final decree was entered December 10, 1935. The court denied the relief prayed against petitioners herein and dismissed the bill of complaint, but granted a permanent injunction against the assessment or collection of taxes accruing between November 1, 1935, and December 10, 1935, in excess of one and one-half percent of the sale price at the mines on sales or other disposals of bituminous coal by the Carter Coal Company.

The court also granted a temporary injunction, pending final determination of the cause on appeal, restraining the Carter Coal Company and its officers from filing an acceptance of the code or paying the tax imposed by the Act and restraining the petitioners herein, pending such determination, from collecting or attempting to collect the tax from the Company, conditioned upon the payment to a depositary approved by the court of one and one-half percent of the sale price at the mines on sales or other disposals of bituminous coal by the Carter Coal Company for the period beginning November 1, 1935, the sum so paid to be held by the depositary pending final judicial disposition of this case.

"On December 16, 1935, respondent Carter filed his appeal with the United States Court of Appeals for the District of Columbia and on the same day he filed in this Court a petition for a writ of certiorari. (October Term, 1935, No. 636.) As appears from a memorandum filed this day, these petitioners, who are respondents in No. 636, acquiesce in the petition for writ of certiorari in that cause.

On December 10, 1935, the petitioners herein also took an appeal to the United States Court of Appeals for the District of Columbia from that part of the decree, numbered "(2)", granting a permanent injunction for the period from November 1, 1935, to December 10, 1935, as to all taxes imposed in excess of one and one-half percent of the sale price at the mines of coal produced by the Carter Coal Company. In the present petition,

petitioners seek review of that portion of the decree. If certiorari is granted, this cause will be submitted on the same record as No. 636.

SPECIFICATION OF ERROR TO BE URGED

The Supreme Court of the District of Columbia erred in holding that the respondent Carter was entitled to a permanent injunction restraining the petitioners herein from assessing or collecting any tax in excess of one and one-half percent of the sale price at the mines on sales or other disposals of bituminous coal by Carter Coal Company between November 1, 1935, and December 10, 1935.

REASONS FOR GRANTING THE WRIT

It is of public importance to have settled the question whether or not the tax imposed by Section 3 of the Act can be avoided for a period by the filing of an injunction suit. At the present time there are over fifty cases pending in the lower Federal courts attacking the validity of the Bituminous Coal Conservation Act of 1935, and presumably in all of these cases permanent injunctions against the collection of taxes under the Act during the period of litigation will be sought. New cases are being filed in numbers daily. Until final determination of the question whether a producer who brings suit is entitled to permanent injunctive relief against the collection of taxes accruing during the pendency of judicial proceedings, even though the taxing provisions are held valid, the lower Federal courts, the enforcement authorities, and the bituminous

coal industry will be in a state of uncertainty as to the period of pendency of suits to test constitutionality.

The issue is of vital concern to the coal industry as well as to the Government. If the decision of the court below in this case is followed by other courts, coal producers who bring suit will be relieved of the duty of compliance with the tax provisions during the pendency of litigation and will thus gain a competitive advantage over producers who comply with the Act. The result will be to put a premium upon litigation and to invite prolonged suits which will result in permanent injunctions against taxes accruing during the period of litigation, even if the constitutionality of the legislation under attack is ultimately upheld.

As heretofore noted, petitioners herein do not oppose the petition for certiorari filed by respondent Carter in No. 636. That petition seeks final determination by this Court of the question settled adversely to respondent Carter in the court below. It is desirable also that this Court review the provisions of the decree permanently enjoining assessment and collection of taxes during the period between November 1, 1935, and December 10, 1935, which are the only provisions of the decree adverse to petitioners herein.

WHEREFORE it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

DECEMBER 1935.

* U. S. GOVERNMENT PRINTING OFFICE: 1935